

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Reexamination of Roaming Obligations of
Commercial Mobile Radio Service Providers

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WT Docket No. 05-265

PETITION FOR RECONSIDERATION OF SPECTRUMCO LLC

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SpectrumCo LLC (“SpectrumCo”) hereby submits its Petition for Reconsideration in the above-captioned proceeding.¹

I. INTRODUCTION & SUMMARY

The Commission’s recent decision to clarify that automatic roaming is a common carrier service was a significant and important step forward in building a wireless “network of networks” and in fostering an even more competitive wireless marketplace. However, the Commission also took two unnecessary steps that dampened the significance and usefulness of its decision: first, it created a significant loophole in the automatic roaming right by creating a “home roaming” exception; second, it limited the automatic roaming right to only those services that touch the public switched telephone network (“PSTN”). Both of these decisions tend to

¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007) (“2007 Roaming Order” or “2007 Roaming Further Notice,” as appropriate). SpectrumCo did not participate in the initial pleading cycle in this proceeding because it was not an interested person at that time. Since then, the Commission held the Advanced Wireless Services Auction (“AWS Auction” or “Auction 66”), in which SpectrumCo acquired \$2.4 billion worth of Commission spectrum licenses. The company recognizes that access to automatic roaming on reasonable and non-discriminatory terms is critical to its ability to use the spectrum to offer competitive, innovative wireless communications services. *See* 47 C.F.R. § 1.429(a) (“Any interested person may petition for reconsideration of a final action in a proceeding conducted under this subpart....”).

defeat the purpose of the automatic roaming decision, and harm consumer interests by hampering or even outright deterring new competitive entry. These two decisions warrant swift reconsideration.

On the first point, the “home roaming” decision runs counter to the Commission’s policy of encouraging new entry, as stated in its previous roaming decisions as well as numerous other proceedings. By allowing incumbent carriers to deny automatic roaming service to requesting carriers in any area where the requesting carrier has a wireless license or spectrum usage rights, the Commission has effectively withdrawn the automatic roaming right at the critical moment -- when a new entrant has commenced construction of its network and is trying to get its service off the ground. The Commission’s stated concerns regarding build-out are misplaced -- licensees already have ample incentive, as well as clear legal requirements attached to their licenses, to deploy their networks as expeditiously as possible.

On the second point, the decision to use the PSTN as a jurisdictional device is left almost entirely unexplained. It is anachronistic and effectively renders the automatic roaming right obsolete for many existing and future wireless services and products.

The Commission should correct these missteps. It should reaffirm its long-standing recognition of the importance of roaming for encouraging and fostering the development of new competitors and new services in the wireless marketplace, regardless of whether the requesting carrier has a wireless license or spectrum usage rights in a particular area and regardless of whether the service touches the PSTN.

Specifically, the Commission should revoke the “home roaming” exception and it should redefine the automatic roaming right to include services that may not necessarily touch the

PSTN. Only in so doing will the Commission ensure that its roaming rules meet consumer expectations and maximize consumer benefits.

II. THE COMMISSION’S “HOME ROAMING” EXCEPTION WILL BURDEN, NOT ENCOURAGE, NEW POTENTIAL ENTRANTS

SpectrumCo recently acquired \$2.4 billion worth of spectrum licenses in the Commission’s highly successful AWS Auction.² As a new potential entrant, SpectrumCo is in a position to convey to the Commission the important role that roaming plays as new entrants look for ways to enter the wireless marketplace. The Commission has recognized this in the past, and has understood the particularly disadvantageous position in which new entrants stand vis-à-vis established incumbent competitors.³ Unfortunately, the logic used by the Commission to justify the “home roaming” exception turns the Commission’s policy of fostering competition and encouraging new entry on its head.

The “home roaming” exception is especially troubling for two reasons. First, as a general matter, the exception effectively reduces rather than enlarges roaming rights. Automatic roaming has become the industry norm in recent years, denied only in circumstances that raise significant suspicion that efforts to avoid competition on the merits are involved. The “home roaming” exception will be interposed in efforts to legitimize this type of anti-consumer conduct if it is left unchanged. Second, specifically with regard to AWS licensees, the exception degrades the position of new entrants seeking to rely on AWS spectrum given the well-

² See *Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66*, Public Notice, DA 06-1882 (rel. Sept. 20, 2006).

³ In 1996, the Commission noted that “newer entrants may be at a competitive disadvantage vis-à-vis incumbent wireless carriers if their subscribers have no ability to roam on other networks.” *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Report & Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 6462 ¶ 11 (1996) (“1996 Roaming Order”).

understood reality that spectrum clearing is a lengthy process, particularly when government incumbents with important uses must be accommodated. The exception becomes a barrier to entry by effectively barring any entry until a very large geographic footprint has been deployed, or limiting a new entrant to serving only the very limited portions it has built out as it enters the marketplace. In either case, competition and consumer welfare is diminished. To restore those public benefits and promote new entry, the Commission should revoke the “home roaming” exception.

A. Fostering Competition And Encouraging New Competitive Entry Has Been A Cornerstone Of The Commission’s Wireless Policy.

The Commission is correct in recognizing that its roaming rules have an impact on fostering wireless competition, but it draws from that recognition the wrong conclusions, and takes action that will harm, not encourage, new entry. Access to roaming for new entrants was one of the key factors considered by the Commission when it expanded the roaming rights to include all Commercial Mobile Radio Service (“CMRS”) providers in 1996.⁴ By contrast, the instant Order’s “home roaming” exception to the automatic roaming rights will harm, not encourage, facilities-based competition. It has the effect of pulling the rug out from under new entrants at precisely the time that automatic roaming is essential to them.

The importance of promoting new wireless entry into is reaffirmed by two of the Commission’s most important spectrum management policy decisions: in the Advanced Wireless

⁴ *Id.* (“[R]oaming is a key competitive consideration in the wireless marketplace.”). Even as far back as 1981, when the Commission decided to expand its wireless allocation to allow two competitors in a single market, the Commission stated that its criteria in choosing licensees should be related to its goal of “implementing a nationwide high-capacity mobile communications service capable of providing both local and roaming mobile telephone users the ability to place and receive calls.” *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems, Report and Order*, 86 FCC 2d 469 ¶ 75 (1981).

Services (“AWS”) band plan⁵ and in the recently released 700 MHz band plan.⁶ In the AWS proceeding, the Commission adopted a revised band plan that “increases the variety of licenses to meet the needs of potential new entrants.”⁷ And in the very recent 700 MHz proceeding, the Commission adopted a band plan that included a large spectrum block specifically designed to encourage entry by a new competitor.⁸ The “C Block” includes 22 MHz of spectrum, which “will enable the provision of many services, including VoIP, broadband internet access, and streaming audio and video programming, to be offered at higher speeds, to a greater number of subscribers, and with more advanced capabilities than could be offered on smaller-sized

⁵ See *Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, Order on Reconsideration*, 20 FCC Rcd 14058 (2005) (“*AWS Order on Reconsideration*”).

⁶ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, Second Report and Order*, 22 FCC Rcd 15289 (2007) (“*700 MHz Second Order*”).

⁷ *AWS Order on Reconsideration* ¶ 34. The value of significant potential entrants such as SpectrumCo to the consuming public is well recognized. Significant potential entrants can benefit consumers by causing incumbents to perform better even prior to their entry, in addition to their competitive efforts once they have entered. See U.S. Department of Justice, *Non-Horizontal Merger Guidelines* (1984), available at <http://www.usdoj.gov/atr/public/guidelines/2614.htm>. See also *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). As a result, unnecessary barriers to entry -- such as an improperly defined automatic roaming right -- will harm both present and future competition and consumers.

⁸ See *700 MHz Second Order* ¶ 75 (noting that “larger spectrum blocks offer important benefits, including providing sufficient spectrum to support the deployment of new and emerging competitors”) (emphasis added).

spectrum blocks,”⁹ and will be licensed as a regional economic area grouping (“REAG”), rather than a smaller geographic license area, in an effort to help reduce transaction costs for potential new entrants.¹⁰ Though contentious, many of these decisions were specifically taken for the purpose of promoting a new wireless entrant.

The AWS Auction was a tremendous success, and the 700 MHz Auction holds significant promise. SpectrumCo acquired licenses in Auction 66 that give the company a near-nationwide footprint.¹¹ Other parties acquired licenses that will enable them to deploy their service to new markets or grow their services in existing markets.¹² The 700 MHz Auction promises similar results. Prior to the Commission adopting its service rules, numerous new potential entrants advocated band plans and service rules that would allow them or other new entrants to use the spectrum to provide an alternative to existing wireless providers.¹³ Reports indicate that in the

⁹ *Id.* ¶ 76.

¹⁰ *Id.* ¶ 75, 81. SpectrumCo cites to these measures as examples of the importance that the Commission has placed on encouraging new entrants in the wireless marketplace, but it does not wish to pass judgment on the necessity of these measures. Notably, SpectrumCo was able to piece together a near-nationwide footprint in Auction 66 without any such benefits.

¹¹ *See supra* fn. 2.

¹² *See, e.g.,* Kevin Fitchard, “No winner-take-all for AWS”, *Telephony Online* (Oct. 23, 2006), available at http://telephonyonline.com/mag/telecom_no_winnertakeall_aws/ (“Leap gained several large markets — among them Chicago, Philadelphia and Washington — and also won two regional licenses for the Great Lakes and central regions.”); “MetroPCS and Leap worry cellco giants as AWS auction ends”, *The Register* (Sept. 18, 2006), available at http://www.theregister.com/2006/09/18/aws_auction_nears_end/ (“MetroPCS has spent at least \$1.4bn on new spectrum and will be able to expand its services into Las Vegas and New York, among other areas”).

¹³ *See, e.g.,* Comments of Frontline Wireless, LLC, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Dkt No. 06-150 (filed March 6, 2007); Joint Comments of Access Spectrum, DIRECTV, EchoStar, Google, Intel, Skype, Yahoo!, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Dkt No. 06-150 (filed May 23, 2007).

weeks since the Commission announced the details of its band plan and auction procedures, even more companies have been contemplating participating in the auction.¹⁴ Commissioner Copps called the 700 MHz spectrum “some of the most valuable spectrum on earth,” and cited as one of the Commission’s top priorities “increas[ing] the number and quality of wireless services available to American consumers.”¹⁵

But access to spectrum is not enough to promote new wireless competitors. The Commission has always coupled access to spectrum with access to the truly critical services that incumbents already provide each other, most notably roaming. The Commission’s decision in 1996 to expand the roaming right to cover all CMRS carriers was made at a time when broadband Personal Communications Service (“PCS”) licenses were in the midst of being auctioned and licensees had not yet built out or deployed their networks.¹⁶ The Commission concluded “that the availability of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications,” and was concerned that nascent competitors would be harmed by a lack of access to roaming, because “during the period in which broadband [PCS] systems are being built, market forces

¹⁴ Peter Burrows, “Apple Eyes the Wireless Auction”, *BusinessWeek* (Sept. 10, 2007) available at http://www.businessweek.com/technology/content/sep2007/tc20070910_014733.htm (“Talk of the government's pending auction of valuable wireless spectrum has focused largely on one intriguing newcomer to the bidding: Google. But another tech powerhouse has considered joining the bidding as well: Apple.”)

¹⁵ *700 MHz Second Order*, Statement of Commissioner Copps.

¹⁶ For example, the auction of the PCS A and B block licenses was completed on March 13, 2005, about fifteen months before the Commission expanded roaming rights by adopting the 1996 Order. See *Commercial Mobile Radio Service Information: Announcing The Winning Bidders In The FCC's Auction of 99 Licenses To Provide Broadband PCS In Major Trading Areas: Down Payments Due March 20, 1995*, Public Notice, PNWL 95-28 (rel. March 13, 2005).

alone may not be sufficient to cause roaming to become widely available.”¹⁷ In other words, the Commission expanded the roaming requirements to include the newly minted licensees because it was rightly concerned that a carrier building out its network to compete with other carriers would be the party most in need of roaming, but the party least likely to acquire roaming from its competitors. The Commission reaffirmed this concern in 2000¹⁸ and 2005¹⁹ when it sought comment on whether to apply the roaming right to both manual and automatic roaming. This concern for new entrants was strangely and conspicuously absent from the Commission’s latest Order.

The Commission’s “home roaming” exception effectively reverses previous Commission policy. Under this exception, requesting carriers do not have an automatic roaming right in areas where they happen to have wireless licenses or other spectrum usage rights (such as spectrum leases).²⁰ Effectively, the “home roaming” exception creates a situation where the rule requires incumbents to offer roaming in areas where market forces are *most* likely to work, while withdrawing the roaming right in those situations where market forces are *least* likely to work. If a new entrant acquires a license for a particular area, its competitors have no incentive to offer roaming agreements on reasonable and non-discriminatory terms while the new entrant deploys its network. Just the opposite -- the competitors have incentives to raise the new entrant’s costs and degrade the quality of its service by either denying the new entrant access to roaming or

¹⁷ *1996 Roaming Order* ¶ 2.

¹⁸ *See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking*, 15 FCC Rcd 21628 ¶ 5 (2000).

¹⁹ *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers/Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047 ¶ 5 (2005).

²⁰ *See 2007 Roaming Order* ¶ 48.

charging unreasonably high rates for roaming. This may be less applicable when the “new entrant” is an existing carrier that is expanding into a new area -- that carrier may have already built out its network in areas where other carriers also need roaming agreements, and so it may have some leverage in seeking roaming agreements in the areas into which it is expanding.²¹ A truly new potential entrant, such as SpectrumCo, or any of the numerous rumored applicants for the 700 MHz auction, should they apply for and successfully acquire licenses in the 700 MHz auction, lacks such leverage. The survival of these new potential entrants depends upon having access to a service that can only be provided by the very companies who stand to gain the most from their failure.

New potential entrants with nationwide ambitions are particularly harmed by the “home roaming” exception. A new potential entrant with nationwide ambitions that seizes an opportunity to acquire a nationwide spectrum footprint -- as SpectrumCo did in the AWS Auction, and as the Commission hopes will happen in the 700 MHz Auction -- will be unable to avail itself of the automatic roaming right that the Commission adopted. The existing nationwide carriers will rightly view the new potential entrant as a competitive threat anywhere and everywhere, and their incentives to degrade the new entrant’s service or raise the new entrant’s costs by denying automatic roaming agreements or charging unreasonably high prices will increase commensurately.

²¹ This is not to suggest that smaller CMRS providers do not have a valid argument that they are being treated unfairly in the rates and terms demanded by nationwide carriers for roaming. Rather, the point is that a CMRS providers’ leverage in these negotiations increases as they build out their network, such that even if smaller regional providers have more leverage than a new potential entrant that has not yet deployed its network, the four nationwide providers still have much more leverage vis-à-vis smaller regional providers.

Finally, the Commission's "home roaming" exception is particularly problematic to AWS licensees such as SpectrumCo. As the Commission is well aware, the AWS spectrum must be cleared of thousands of incumbents prior to its use by the licensee. AWS licensees, such as SpectrumCo, are working diligently to clear the spectrum, but it will not happen overnight. In fact, under the Commission's rules, an incumbent may not complete its relocation from AWS spectrum for years. Moreover, many of the federal government incumbents can continue to use the spectrum for four and five more years. Parties that acquire 700 MHz licenses will face a similar situation -- they will have to wait until at least February 17, 2009, if not longer, before that spectrum will be cleared for their use.²² As explained in the Order, the "home roaming" exception denies automatic roaming rights to these licensees, even though they are not yet able to use the spectrum. Even if it is good policy to deny licensees the right to request automatic roaming in areas where they have spectrum usage rights -- which it is not -- it is certainly not good policy to deny licensees access to automatic roaming when they cannot even use the spectrum rights they have acquired.

B. The Commission's Concerns Regarding Licensees' Incentives To Build Out Their Networks Are Misplaced.

The Commission's stated reason for adopting a "home roaming" exception is that it wishes to encourage facilities-based competition.²³ The Commission sides with the arguments put forward by Cingular and others that the requesting carriers would "piggyback" on the networks of the incumbent carriers, reducing the incentives for both incumbent and competitor to

²² See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat 4 (2006). Title III of the Act is the DTV Act.

²³ See *2007 Roaming Order* ¶ 49.

build out their networks to high-cost areas.²⁴ The Commission has heard and rejected these arguments in the past²⁵ -- and it should do so again here.

First, regardless of the economic incentives at play, wireless licensees already have build-out requirements attached to their licenses. For example, in the 700 MHz proceeding, the Commission imposed relatively stiff build-out requirements for licensees: “REAG licensees must provide signal coverage and offer service to at least 40 percent of the population in each [Economic Area (“EA”)] in its license area within four years and 75 percent of the population of each of these EAs at the end of the license term;”²⁶ “for licenses based on [Cellular Market Areas (“CMAs”)] and EAs, licensees must provide signal coverage and offer service to: (1) at least 35 percent of the geographic area of their license within four years of the end of the DTV transition, and (2) at least 70 percent of the geographic area of their license at the end of the license term.”²⁷ In previous auctions, such as the AWS Auction, the Commission adopted a “substantial service” build-out requirement, which is defined as “service that is sound, favorable and substantially above the level of mediocre service that just might minimally warrant renewal.”²⁸ If the Commission decides that a particular licensee has not met its build-out

²⁴ *Id.*

²⁵ *See 1996 Roaming Order* ¶ 8 (“some commenters argue ... [that] a roaming requirements might obstruct or discourage buildout of networks and technical innovation.”).

²⁶ *700 MHz Second Order* ¶ 163.

²⁷ *Id.* ¶ 157.

²⁸ *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Rcd 25162 ¶ 75 (2003). Although this standard is not as exact as the standards adopted in the 700 MHz Order, the Commission concluded that “[t]his requirement provides the flexibility required to accommodate the new and innovative services that we believe will be forthcoming in these bands.” *Id.* The Commission also noted that the substantial service standard “is particularly appropriate here because the incumbency of federal and other current licensees in these bands would make specific benchmarks for all new licensees inequitable.” *Id.* ¶ 76.

requirements, regardless of whether such failure is due to incompetence, negligence, or a conscious decision to favor “piggybacking” instead of deploying its own network, the Commission already has the authority to reassign that license.²⁹ Accordingly, it need not use the denial of roaming rights as further incentive to build out.

Second, even if the Commission had not already imposed build-out obligations on the wireless licenses, the fact remains that there are significant incentives for carriers to choose to deploy their own network rather than piggyback on other networks. Cingular is right that “superior network coverage” is an important competitive consideration, but it reaches the incorrect conclusion that smaller carriers would rather piggyback than invest in achieving their own superior network coverage. First, no carrier with significant aspirations would rather provide service to its customers using another carriers’ network if it can feasibly have its own network in place. That is why carriers and potential carriers spend significant sums of money to acquire or expand their spectrum usage rights in the first place. Second, roaming rates, as they stand today, are much higher than retail rates -- a smaller carrier cannot expect to compete when its subscribers are roaming all the time, or even a large percentage of the time.³⁰ Third, carriers

²⁹ In the context of the 700 MHz band proceeding, the Commission decided that failure to meet any of the interim requirements could result in a 2 year reduction of the license term, and that these licenses “will be subject to a “keep-what-you-use” rule, under which the licensee will lose its authorization for unserved portions of its license area.” *700 MHz Second Order* ¶ 153.

³⁰ This is especially true in light of the Commission’s decision not to regulate particular roaming rates. *See 2007 Roaming Order* ¶ 37. Many commenters in this proceeding brought forth evidence that the wholesale roaming rates paid by home carriers are higher -- sometimes substantially higher -- than the host carriers’ retail rates. *See, e.g.,* Comments of Leap Wireless, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Dkt. No. 05-265, at 13-15 (filed Nov. 28, 2005). The nationwide carriers do not dispute this fact, chalking it up to the machinations of the marketplace. *See, e.g.,* Reply Comments of Cingular Wireless, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Dkt. No. 05-265, at 6 (filed Jan. 26, 2006) (arguing that the examples of rates charged by nationwide

deploying next generation networks have every incentive to build out to ensure that their subscribers receive all of the benefits of the carrier's advanced network. These carriers will undoubtedly seek to provide their customers with a unique "look and feel" to their network and the services provided over the network, but they will be less able to control that "look and feel" if their subscribers are roaming on other carriers' networks. These carriers will have every incentive to ensure that their subscribers are roaming as little as possible.

* * * * *

By choosing to create a "home roaming" exception to the automatic roaming right, the Commission has effectively created a regime whereby new entrants will have to build out to all parts of their license areas before they can serve anybody, if they wish to sell a geographically ubiquitous service. The Commission has deemed that sort of requirement unreasonable in other contexts;³¹ if it is unreasonable in those contexts, it is certainly unreasonable here. It could delay by years the ability of a new entrant to offer service in any market, and it will surely serve as a disincentive to enter the wireless space at all. As a practical matter, the Commission has little reason to worry that new entrants will not deploy their own networks, but significant reason to worry that incumbents will deny new entrants access to critical services at a critical time. For all of these reasons, the Commission should revoke the "home roaming" exception.

carriers "merely demonstrate the pro-consumer, competitive nature of the CMRS marketplace"). Because the Commission will not specifically regulate roaming rates, one can reasonably expect this pricing situation to continue, ensuring that home carriers have an incentive to build-out their networks as quickly as possible.

³¹ *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 ¶ 89 (2007) (finding that "absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone").

III. USE OF THE PUBLIC SWITCHED TELEPHONE NETWORK AS A “JURISDICTIONAL” DEVICE IS ANACHRONISTIC

The second decision made by the Commission that warrants reconsideration is the decision to use the public switched telephone network as a “jurisdictional” device or delimiter of the automatic roaming right. Although it is thoroughly implicated by the Further Notice,³² the use of the PSTN in this manner is an obvious anachronism and should be changed.

The Commission offers no basis or justification for this distinction. Rather, it proffers the conclusory statement that its “findings are consistent with the Commission’s previous determinations.”³³ It is hard to see how this is so. In its 1996 decision, the Commission makes no determination or finding regarding whether the communication in question has to be two-way voice communication that touches the PSTN to qualify for the roaming right. Instead, the Commission says clearly that, while roaming, end users can “communicate messages of their own choosing.”³⁴ Further, the 1996 decision referred to broadband PCS licenses, which the Commission believed would revolutionize wireless services by “provid[ing] a variety of mobile services that will compete with existing cellular services,” as well as “new mobile communications capabilities that are not currently available.”³⁵ It does not make sense that the Commission would have expanded the roaming right to include these licensees, which the Commission expected to introduce new wireless services that may or may not touch the PSTN, while also limiting the reach of the roaming right to only those wireless services that do touch the PSTN.

³² See *2007 Roaming Further Notice* ¶¶ 77-81.

³³ *2007 Roaming Order* ¶ 23.

³⁴ *1996 Roaming Order* ¶ 10.

³⁵ See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532 ¶ 3 (1994).

Today, it still makes no sense for the Commission to draw this arbitrary line at the same time that the services the Commission envisioned in the mid-1990s are becoming more widespread, and as the Commission is auctioning spectrum with the intent of attracting new entrants that it hopes will offer even more innovative and exciting new wireless services and products. The Commission clearly expects the licensees of the AWS spectrum and the 700 MHz spectrum to offer “new wireless broadband services”³⁶ and hopes that the policies it set forth “could provide new opportunities for a wide variety of technologies and business plans.”³⁷ Roaming is now, as it was in 1996, an integral ingredient in any new entrant’s business plans until it gets off the ground. By limiting the automatic roaming right to only those services that touch the PSTN, the Commission has created a right that was essentially outdated the moment it was released, and increases the burden on the new potential entrants and services that it hopes will emerge from the AWS and 700 MHz Auctions.

³⁶ *AWS Order on Reconsideration*, Statement of Chairman Martin.

³⁷ *700 MHz Second Order*, Statement of Commissioner McDowell.

IV. CONCLUSION

The Commission's decision to clarify that automatic roaming is a common carrier right is an important step forward. Unfortunately, the beneficial impact of that step has been dampened by the Commission's concurrent decisions to exempt from the automatic roaming right services that do not touch the PSTN and "home roaming." These exceptions are contrary to years of Commission policy and warrant reconsideration. The Commission should revoke the "home roaming" exception, and it should redefine the automatic roaming right to include services that may not necessarily touch the PSTN.

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